



CLEAN WATER ACT §404 PROGRAM TECHNICAL WORKING GROUP – FEES WHITE PAPER

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*This white paper is solely a product of the volunteer
technical work group members and should not be
considered an ADEQ decision document.*

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I. Introduction

The Arizona Department of Environmental Quality (“ADEQ”) is reviewing the possible option of taking primacy for the Federal Clean Water Act §404 (“CWA §404”) Permit Program which is currently administered by the United States Environmental Protection Agency (“EPA”) and the United States Army Corps of Engineers (“Corps”). In general terms, the CWA §404 Permit Program covers the placement of dredged or fill material in the “waters of the United States”.

As currently administered, applicants submit the completed CWA §404 permit applications to the Corps District Engineer having jurisdiction over the proposed activity. The Corps issues the following five types of CWA §404 Permits or authorities:

1. Individual §404 Permits;
2. Letters of Permission.
3. Regional General §404 Permits;
4. Programmatic General §404 Permits and
5. Nationwide §404 Permits.

Should ADEQ take primacy for the CWA §404 Permit Program, the Corps/EPA will retain CWA §404 Permit Program jurisdiction over certain waters defined in CWA §404(g)(1) which includes waters which are or could be used to transport interstate waters and foreign commerce, waters subject to the ebb and flow of the tide, and wetlands adjacent to these waters (i.e., generally the Colorado River for Arizona). In addition, ADEQ will not have primacy for any lands identified as tribal lands in Arizona. **Exhibit 1** identifies tribal lands and waters for which the Corps will retain jurisdiction.

The Fees-Technical Working Group (“Fees-TWG”) is a voluntary working group of environmental professionals with significant experience in the CWA §404 Permit Program which is working under a Group Charter to provide a white paper for ADEQ management to assess: (1) the possible costs associated with obtaining primacy over the program; and (2) the possibility of assessing ADEQ fees to cover the annual costs of the ADEQ §404 Permit Program. It should be noted that the definition of “waters of the United States” has been and continues to be a subject of legal, technical and practical discussion. The final definition will likely affect the issues surrounding fees associated with ADEQ’s assumption of the CWA §404 Permit Program or authority for the five identified CWA §404 Permits.¹

It should be noted that the ADEQ does not currently receive general fund monies, and has not for many years. The Agency runs on a ‘fee for service’ model and the current administration anticipates that the Corps program would run the same way.

¹ The EPA released “pre-publication” version of the proposed definition on December 11, 2018 (which can be found here: https://www.epa.gov/sites/production/files/2018-12/documents/wotus_2040-af75_nprm_frn_2018-12-11_prepublication2_1.pdf) This version was not considered in Fees-TWG analysis for this paper.

II. Current State of Corps §404 Program

Fees

Under the Corps jurisdiction, CWA §404 Permit Program fees are assessed for permit applications. A fee of \$100 is charged when the planned or ultimate purpose of the project is commercial or industrial in nature and is in support of operations that charge for the production, distribution, or sale of goods or services. A \$10 fee is charged for permit applications when the work is non-commercial in nature and provides benefits that have no connection with a commercial enterprise. The final decision on the fee (commercial vs. non-commercial) is solely the responsibility of the Corps District Engineer. No fee is charged if the applicant withdraws the application at any time prior to issuance of the permit and/or if the application is denied. Collection of the fee is deferred until the applicant is notified by the Corps District Engineer that a public interest review has been completed and that the proposed activity has been determined to be in the public interest. When the Corps issues a permit, the Applicant must submit the required fee payable to the Treasurer of the United States. Any modification significant enough to require a public notice will also require an additional \$100 fee. No fee is assessed for activities authorized by a General Permit, a Nationwide Permit, and Letters of Permission or when a permit is transferred from one property owner to another. No fees are charged for time extensions.

Water Quality Certification

CWA §401 requires any applicant for a Corps-issued CWA §404 Permit for an activity that may result in the discharge of a pollutant into waters of the United States to obtain a certification that the discharge will comply with applicable effluent limitations and water quality standards. In Arizona, applications for CWA §401 water quality certifications are currently reviewed by ADEQ. No changes are contemplated in the current ADEQ responsibility for water quality certifications. It should be noted that for the CWA §404 permits issued by ADEQ there will not be a CWA §401 certification. The CWA §401 certification is limited to a federally issued CWA §404 permit. ADEQ will be incorporating CWA §401 requirements into the CWA §404 permit issued by them. ADEQ will continue to issue CWA §401 certification for CWA §404 permits issued by the Corps (except for Tribal Lands).

Agency Funding

Pima County and the Arizona Department of Transportation (ADOT) each currently fund a dedicated employee at the Corps to specifically process their permits. Both agencies pay \$172,000 annually from federal funds for that permit writer. In talking with ADOT representatives, they indicated that they may average four individual permits a year in addition to any Nationwide Permits or Regional General Permits that they use.

Benefits

The benefits of the current fee structure CWA §404 Permits that is utilized by the Corps are easy to identify: the fees are low or zero. For commercial permits, defined as projects that support operations that charge for the production, distribution or sale of good or services, the fee is \$100 and it is assessed once the permit is received. For non-commercial permits, defined as projects that provide personal benefit with no connection to a commercial enterprise, the fee is \$10. There is no fee for jurisdictional delineations, for transferring a permit from one property owner to another, for time extensions and governments at all levels, don't pay fees in connection with permits.

Drawbacks

There are no identified drawbacks to the current fees or fee structure that are utilized by the Corps. It should be noted though, that the indirect costs associated with the Corps permit process are large. While these may not be fees collected by the Corps, they are very real costs to the permittee in terms of time spent waiting for permit approval. The Corps data² shows the average elapsed time for a nationwide permits can range from 30 to 150 days. These costs, along with the published fee structure, are considered by permittees before undertaking projects and could prove to make projects cost prohibitive.

III. Future Arizona CWA §404 Program Structure

Permits

As previously identified, there are five basic types of permits that the Corps issues. Individual CWA §404 Permits, Letters of Permission, Regional General CWA §404 Permits, Programmatic General CWA §404 Permits, and Nationwide CWA §404 Permits. Each of these permits will have varying levels of complexities, notifications, and effort to process them. Each is discussed below along with a brief discussion on how ADEQ might deal with them in their own program in a future state.

Fees for the different types and level of effort could be assigned to these five types of CWA §404 Permits. The complex Individual Permits have the potential to impact the workload of the ADEQ permitting team and require the most time and effort. The number of Individual CWA §404 Permits may be affected by the economic environment so in poor economic times they might be limited in number.

Individual CWA §404 Permit

These permits can have different levels of efforts to process them based upon the impacts to waters and complexity of the project. These permits in general will require the most effort from ADEQ staff to issue. They can range from large impacts to waters of the United States or wetlands, to relatively minor impacts with simpler projects. The latter can be processed with relative minimal time and effort. Individual CWA §404 permits by law require a Jurisdictional Determination (JD) to be conducted, a CWA §404(b)(1) alternative analysis to be completed, as well as preparation and review of a mitigation plan, and review and approval of the proposed compensatory mitigation for waters of the United States. They will also require some type of consultation with other federal or state agencies and a significant public process component. ADEQ will have to deal with each of these described elements to issue a CWA §404 Individual Permit.³

According to the Corps, these permits are fewer in number. Based upon the Corps data, ADEQ estimates that it would issue on average about eight permits per year of the more routine ones. While

² The Fees-TWG used normalized data for analysis in this paper.

³ In adopting the CWA §404 program, ADEQ will be issuing these permits and will need to address how to deal with issues under the Endangered Species Act (ESA) and cultural resources coordination. ADEQ has two other TWG to deal with the details of these issues.

the more complicated ones will be fewer in number they will take a significant effort to process and take more time.

Letters of Permission (LOP)

These authorities could be considered a subset of an Individual Permit. These letters are issued by the Corps and are specific to a permittee and have activity specific conditions in them. The LOP lays out specific procedures to be used when conducting specific activities within a defined area. The permittee is required to submit an application under LOP for an activity. This application is the same one a permittee would have previously submitted for an Individual CWA §404 Permit. The Corps will review the application and if it meets the requirements they issue a LOP permit based upon the conditions previously approved by the Corps.

The LOP will require a significant level of effort by ADEQ up front to develop the procedure and conditions and submit them to the public participation process. Once developed, the LOP are self-sustaining and can apply over a longer period of time. It is not known how many of the Individual CWA §404/LOP Permits will be requested from ADEQ.

Regional General CWA §404 Permits (RGP)

Regional General Permits (RGP) are Corps permits that authorize activities that are similar in nature and cause only minimal adverse impacts to aquatic resources, separately or on a cumulative basis. These permits are similar to the Nationwide Permits described below. They are fewer in number and only about four are applicable to Arizona: (1) RGP 70 (Bio Engineered Bank Stabilization); (2) RGP 96 (ADOT regional permit); (3) RGP 81 (Pima County specific condition); and (4) RGP 63 (emergency use). These RGP are specific to activities and/or the permittee. ADEQ estimates based upon Corps data that they will issue on average about 17 RGP per year.

Programmatic General CWA §404 Permits (PGP)

PGP's are outlined in 33 CFR 325.5(c)(3) and are similar to the Nationwide Permits described below. It is a type of regulatory permit issued by the Corps that authorizes states, local governments, tribes, or other federal agencies with regulatory programs comparable to the Corps' Section 10 or CWA §404 Program to issue permits for specified activities in lieu of direct Corps' issuance of such permits. The permit is required to be issued every five years. However, in order to use this permit, there are some conditions: (1) the State has to have its own permit program outside the CWA §404 delegated program; (2) the permit is limited to minimal impacts; and (3) it cannot be used if there are Endangered Species Act (ESA) or cultural issues. Under these circumstances the permittee will have to go to the Corps for an Individual permit.

State Programmatic General Permit (SPGP)

A subset of PGP that is administered by a state agency and designed to eliminate duplication of effort between Corps districts and states, as well as to make the permitting process more efficient with flexibility as to the geographic region covered and when nationwide permits are revoked.

Nationwide CWA §404 Permit (NWP)

These are standardized permits that the Corps issues every five years. Currently, there are 52 of them and they are specific to an activity conducted in waters of the United States. They specify the limited impact to water of the United States in order to use them. If you meet the criteria in the described NWP

you can use it. They are straight forward and contain standard permit conditions. Not all of them would be applicable to Arizona because some are specific to activities in coastal waters or Coast Guard-approved bridges. Some of these permits require a Pre-Construction Notification (PCN) and others require PCN only if you are going to impact ESA or cultural resource sites. Based upon the Corps data, ADEQ estimates that it will average about 227 NWP per year.

The ADEQ's level of effort to process these NWP types of permit will vary based upon a number of factors. The simplest ones are limited impact and do not require notification. The ones that require PCN will require some level of ADEQ effort to process them because they will require acknowledgement and review of the PCN by ADEQ staff and coordination among other agencies for ESA and/or cultural issues. This coordination would be somewhat less burdensome than that for an Individual CWA §404 Permit.

ADEQ'S CWA §404 Permit Program Design

It is assumed that both the NWP and the RGP would become ADEQ General Permits. ADEQ has a number of options in taking over these permits.⁴

- **Option 1** - ADEQ initially could adopt by reference the NWP and RGP that would be applicable to Arizona. Under this option, ADEQ would need to only address in rules the issue of compatibility between the Federal and State program. (I.e. Section 7 and 106 consultation requirements).
- **Option 2** - ADEQ could adopt by reference the NWP now and then later develop their own General Permits which could include reducing the number of permits or consolidating activities into one as Michigan did.
- **Option 3** - ADEQ could write its own General Permits now and submit them as part of the delegation package to EPA. This would require a significant effort by ADEQ and would require them to be incorporated in the rules.

According to the Corps, the RGP is one of the easiest permit to process. It may require more work up front but after that, it is relatively easy.

Jurisdictional Delineations, (JD)

The JD is used to determine the amount of waters of the US to be impacted by the proposed project. This is an important step in that it is used to develop the CWA §404 (b)(1) alternative analysis, and the Mitigation Plan for the individual permit processing. There are two types of these determinations, an Approved Jurisdictional Delineation, (AJD) or a Proposed Jurisdictional Delineation, (PJD). These determinations can also require various levels of effort to process as an AJD can take more time than a PJD. In addition, to the complexity between these two, the JDs can be submitted as part of the application in the more straight forward projects or can be processed separately if the project is more complicated. In addition, if the permittee submits an AJD and the state determines there is no jurisdictional waters the permittee will not need to submit a CWA §404 application.

Therefore, In order for ADEQ to take these variables into consideration when processing a JD it should consider an hourly rate separately from the permit application fee. ADEQ currently has a another TWG working on the detail of how it will adopt these requirements and developing licensing timeframes, (LTF).

⁴ ADEQ has another TWG to deal with the details of this issue.

IV. Current ADEQ Water Quality Program Fee

The Fees – TWG looked to other significant ADEQ Permit Programs for possible guidance concerning CWA §404 Permit fees and fee structure. As in most ADEQ permit programs, there would likely be a cap on permit fees limiting the total that any permittee would have to pay. A CWA §404 fee cap was not included in the original Arizona legislation for the CWA §404 permit program but one could be considered for inclusion in ADEQ's rules for the program. The fee structure that currently exists in the ADEQ's Aquifer Protection Permit (APP) program could be used here as an example.

Aquifer Protection Permit Program

The ADEQ's APP program is a permitting program unique to Arizona. Owners or operators of facilities that discharge pollutants to groundwater are required to apply for and obtain APPs from ADEQ in order to protect groundwater quality. This regulation is accomplished through discharge limitations and monitoring of groundwater at and downgradient of discharging facilities. Those facilities may include wastewater treatment plants, mines, septic systems, and industrial facilities that discharge pollutants.

The APP program is a fee-for-service program. Some permits require flat fees, some require fees that are charged by ADEQ via hourly review rates, and some require annual registration fees. The APP program receives no money from the General Fund. Program fees from A.A.C. Title 18, Chapter 14 are presented below.

Application Fee – Aquifer Protection Permit

Permit	Maximum Fee
Individual APP	\$200,000
APP Modifications	\$150,000
Compliance Schedule Submittals	\$100,000-\$150,000
Determination of Applicability	\$15,000
Clean Closure	\$50,000
General Permit (Flat Fees)	\$1,500-\$7,500
General Permit Renewals (Flat Fees)	\$500-\$2,500

Annual Fee – Aquifer Protection Permit

Flow Rate (Annual Fee)	Fee
3,000-9,999 gpd	\$500
10,000-99,999 gpd	\$1,000
100,000-999,999 gpd	\$2,500
1,000,000-9,999,999 gpd	\$6,000
10,000,000 gpd or more	\$8,500

For Individual APPs, APP amendments, Determinations of Applicability, and Clean Closures, ADEQ charges \$122 per hour for staff review. These reviews are conducted by ADEQ project managers, hydrologists, engineers, and other staff.

A comparison of revenue generated by initial permit fees and annual fees is provided below.

Fee Revenue – Aquifer Protection Permit

Year	APP Annual Fees	APP Permitting Fees
2016	\$1,649,000.00	\$704,788.79
2017	\$1,370,298.50	\$637,237.17
2018	\$1,661,250.00	\$434,836.71
MEAN	\$1,560,182.83	\$592,287.56

For 2017, the most recent complete year for which data are available, the annual fees comprise 68% of revenue and permitting fees comprise 32% of revenue. Total revenue for 2017 was \$2,096,086. The Fees-TWG recognizes that most CWA §404 Permits will generally be completed in an expeditious manner by the applicant and that ADEQ will not likely be able to assess Annual Fees for most CWA §404 Permits.

V. Current States with CWA §404 Programs

While many states have considered assuming the CWA §404 program (e.g. Virginia, Montana, Alaska, Oregon and Minnesota) only two states have successfully done so (Michigan and New Jersey) with one more (Florida) currently in the process. All of these states performed implementation studies to help determine the best path forward with most states deciding against it due to high costs of funding the program and difficulty in achieving the necessary state changes to comply with federal law. A number of the States looking at adoption of the CWA §404 program decided to not go forward with adoption due to the inability to secure dedicated funding for it.

Michigan's CWA §404 program began with State three years of general funding, possibly encouraged by the projected State savings of \$2 million by receiving delegation of the program. The State has 50-70 Full Time Employees (FTE) who work on the program and process 4,000 various CWA §404 projects each year. The program has transitioned from state general funding to a permit fees model. If ADEQ decides to take a similar approach, further research should be done on why and how this transition happened in Michigan.

New Jersey's CWA §404 program is funded through user fees. New Jersey's permit application consists of 9 pages that detail CWA §404 actions and the fees associated with each. The cost of CWA §404 General Permits are \$1,000 with Waterfront Development Permit Fees being \$500.

Funding Options

Federal Funds

ADEQ could explore requesting federal funding commensurate to the portion of work that will be assumed by ADEQ after the assumption of the program. This would be undertaken in such a manner to not create a gap in the funding for the programs that the Corps will retain, but to move funds that would be freed up by the assumption to ADEQ.

The table below shows the Corps' total regulatory expenses in Arizona for the past three fiscal years (FY). This amount is for administration of the entire regulatory program including activities under Section 10 of the Rivers and Harbors Act of 1899. The Corps does not have an accurate method to determine what amount of this total cost was expended in CWA §404 Permits that the state may assume. However, based on the Corps internal discussions, it estimates that 80% +/- was spent in waters that would be "assumable" by the State.

Corps staffing for this time period included:

- 3 - GS12 Senior Regulatory Project Managers
- 5 - GS11 Regulatory Project Managers
- 1 - Regulatory Assistant
- 1 – Supervisor

ADEQ should consider that the Corps staff have decades of experience on Arizona applications. Also bear in mind that labor costs shown are fully burdened costs that include overhead, benefits, etc. The "Indirect Support Labor" are costs paid by the Corps Arizona Regulatory Branch to other supporting elements (counsel, planning, resource management, etc.) at the Corps District Office level in Los Angeles.

The funds received through one WRDA 214 agreement and one 23 USC 139(j) funding agreement are included. The total received from these two agreements is approximately \$350,000 and is included in the Arizona Office labor as part of the cost of implementing the Regulatory program in Arizona.

Note that some major expenses vary from year to year, e.g. computers are generally purchased every three to five years, equipment and chairs were purchased in FY16. These major purchases are the reason for the variability in the annual "Miscellaneous Expenses" category.

Expenses - Corps Arizona Regulatory Branch

	FY18	FY17	FY16
Fees Collected	\$100.00	\$200.00	\$200.00
Direct Arizona Office Labor	\$1,640,257.63	\$1,584,549.35	\$1,468,935.48
Indirect (Non-Arizona Office) Support Labor	\$292,868.77	\$207,230.81	\$198,434.76
Miscellaneous Expenses (e.g. travel, furniture, computers, vehicles, office supplies, etc.)	\$73,493.68	\$65,047.17	\$89,946.20
Total Arizona Regulatory Expenses	\$2,006,620.08	\$1,856,827.33	\$1,757,316.44

The CWA §404 fee structures addressed below would apply to both General and Individual permits. The structures are broadly addressed to provide an overview on how they have been used and how they could apply to the ADEQ's CWA §404 permit program.

General Funds

There are multiple ways general funding monies could be utilized by the ADEQ's CWA §404 Permit application program. It could be used to fund the entire program, which could result in no or nominal fees or it could be used to support portions of the program, such as the staffing costs.

General fund monies could be appropriated in two ways: either through a direct appropriation for use by the CWA §404 program or through an appropriation to the agency which the ADEQ Director could direct to the program. A direct appropriation could be included in the state budget or through separate piece of legislation, and would provide a specific dollar amount of funding for the program. Providing an appropriation to the agency allows the ADEQ Director to direct the funds how they feel best supports the agency/program.

Another option related to state funding of the program is a one-time appropriation to "jump start" the program, hire staff, ensure compliance and allow the ADEQ to operate the program for one year to fully understand all the costs involved. A one-time appropriation from the Legislature would allow the ADEQ to accurately model the costs of the program and to set appropriate fees to maintain the program in following years. A one-time appropriation could be included in the budget negotiation process, or by a standalone piece of legislation.

The main benefit of a one-time appropriation is that it would allow ADEQ to cover any unknown costs associated with maintaining the program. This would allow ADEQ to create a blueprint for future fees required to run the program. Additionally, a one-time appropriation would give future program applicants a better understanding of time frames and costs that would be involved for their projects. This would allow the industry to better forecast for future projects and deliver a greater level of certainty for future operations.

The main drawback of the appropriation options discussed above, is the uncertainty that the appropriation will continue to be granted by the Legislature during economic downturns. Any

appropriation for this program would require ADEQ to approach the Legislature on an annual basis. Additionally, future State Legislators, Governor's and/or ADEQ Directors may take an alternative approach by not seeking the continued appropriation, which could end the program abruptly. This ongoing uncertainty may prevent regulated entities from investing in new projects.

Hourly Fees

A fee structure based on an hourly rate is not unprecedented in ADEQ water quality permits. The ADEQ currently has fee authority to charge \$122/hour for individual permits. The benefits of this model include a clear accounting from the agency as to the amount of time spent on each permit. The drawbacks, from a permittee perspective, is that the agency could charge more for a permit that took longer to process. This could be partially remedied by time limits and monetary caps being put into place. The Permitting TWG is working on the LTF and currently under APP the permitting fees are capped. Once ADEQ reaches the fee cap ADEQ will have to continue work on issuing the permit at their own cost

Monthly Deposit

A fee structure based on a monthly deposit is also not unprecedented. This structure involves the permittee paying a lump sum at the beginning of the month or quarter and the agency providing an accounting of how they applied it to their work on the permit. The monthly deposit structure is not a recommended option due to the overhead burden of the monthly accounting and its susceptibility of being swept by the Legislature.

Annual Fees

ADEQ collects annual fees for Water Quality Programs, including the Aquifer Protection Permit (APP) program and the Arizona Pollution Discharge Elimination System (AZPDES) program (A.A.C R18-14-104). These fees are collected annually from permittees and are based on flow rates at permittee facilities. For the APP program, annual fees comprise approximately 68% of annual revenue and thus are an essential component of program funding. The Fees-TWG considered annual fees for the CWA §404 permit program but were unable to identify a nexus or justification for these fees, since once projects are finished there are typically no ongoing permit activities. The TWG recognizes the essential nature of these fees for other programs and the critical funding issues that their absence would create for the ADEQ CWA §404 program. The Fees-TWG strongly encourages the consideration of this white paper's recommendations for ways to replace the revenue that annual fees would otherwise provide. Currently, ARS 49-104(C) provides ADEQ the ability to use Water Quality funds to conduct inspections activities but this would be lost for the CWA §404 permit program if an alternative fee is not identified.

Flat Fees

ADEQ charges flat permit fees and flat renewal fees for some APP general permits (A.A.C. R18-14-108), some AZPDES general permits (A.A.C. R18-14-109) and for reclaimed water general permits (A.A.C. R18-14-110). These permits have standard conditions including prescriptive Best Available Demonstrated Control Technologies (BADCT) and uniform reporting, inspection, and recordkeeping requirements. Renewal fees are paid every two to seven years, depending on the type of general permit. Flat fees should be considered for the CWA §404 permit program for permits that have standardized conditions. Flat renewal fees would not be applicable to the CWA §404 program because once projects are finished no ongoing activities take place.

CWA §106 Funds

Another option for partial funding for the CWA §404 permit program would be to tap CWA §106 (Section 106) funds currently provided by EPA for Water Quality. The Section 106 funds are part of a Cooperative Agreement by which ADEQ receives the money for programs that limit water pollution. This agreement bundles all of the funding ADEQ receives and becomes the Performance Partnership Grant (PPG), which can be used for operating expenses. There is a question as to if Section 106 fund can be used for program development costs along with operating expenses. A case could be made that section 106 funds are part of PPG, and therefore, can be used for operation of a CWA §404 permit program.

Economic Feasibility Study

Although ADEQ's goal is to have a program that is solely fee based, it is recommended that the state perform a further economic feasibility study to determine whether this option would work for both industry, the agency, and the public. If the study shows the best option is for the CWA §404 program to be fee based then guidance on a fee structure could be obtained from the New Jersey or Michigan program (both which appear to be fee based).

VI. Gap Analysis/Discussion

Should ADEQ decide to pursue primacy for the CWA §404 Permit Program from the Corps, the ADEQ application will have to provide documentation to EPA that it can properly cover the potential costs of the program. The potential costs of ADEQ's CWA §404 Permit Program assumption include among other things, the expense of acquiring the technical staff, technical CWA §404 training, administrative resources and information technology infrastructure needed to handle the expanded workload at the ADEQ. In the short-term, there is a cost for a potential loss of the knowledge and technical expertise of the existing Corps staff while ADEQ staff are trained and become experienced in the CWA §404 Permitting process.

ADEQ staff has provided **Exhibit 2** which is a preliminary initial estimate of \$2.1 million on an annual basis to run the CWA §404 Permit Program with ten (10) full-time employees, including \$220,000 projected for legal support services by the Arizona Attorney General.

This estimate was based upon permitting data obtained from the Corps history (2008-2017) of CWA §404 permits in Arizona. As previously discussed, a close evaluation of the Corps permit history suggests that on average ADEQ will likely receive permit applications for the following:

Annual Applications - CWA §404 Permits

	Estimated Annual Applications
Individual §404 Permits Letters of Permission	8 Unknown
Regional General §404 Permits Programmatic General §404 Permits	17
Nationwide §404 Permits	227

Based upon anecdotal experience, the consensus of the Fees-TWG is that ADEQ staff will spend about 50% of the allotted staff time on the Individual §404 Permit applications and Letters of Permission, 25% of the allotted staff time on Regional/Programmatic General §404 Permit applications and 25% of the allotted staff time on Nationwide §404 Permit applications. Based on anecdotal experience, the estimated breakdown of ADEQ costs for each CWA §404 permit is as follows:

Projected Fees Per Permit - CWA §404 Permits

	Estimated Annual Costs/Permits	Projected Permit Fees Per Permit
Individual §404 Permits Letters of Permission	\$1,000,000 / 8	\$125,000
Regional General §404 Permits Programmatic General §404 Permits	\$550,000 / 17	\$32,353
Nationwide §404 Permits	\$550,000 / 227	\$2,423

Other ADEQ permit programs, most notably the Aquifer Protection Permit Program ("APP"), have a continual revenue stream of annual permit renewal fees that provide a significant and consistent portion of the ADEQ program costs. Based on the anecdotal experience, the consensus of the Fees-TWG is that the CWA §404 Permit Program would not generally issue permits that would generally cover multiple years to support an annual fee or a continued ADEQ revenue stream for annual permit renewals.

Although funding is not currently allocated from the federal government for ADEQ to implement a CWA §404 Permit Program, ADEQ should pursue multiple funding options. The ADEQ has indicated that the CWA §404 Permit Program will likely have to be self-funded in order to be successfully adopted in the current legislative climate. The general consensus of the TWG-Fees was that the calculated permit fees/costs, particularly for the Individual §404 Permit, would be cost prohibitive for the regulated community, especially when compared to the existing fee structure by the Corps to issue CWA §404 permits.

VII. Recommendations

In order to reduce the costs for the identified CWA §404 permit program, the Fees-TWG suggests that ADEQ consider the following:

- A CWA §404 fee cap was not included in the original Arizona legislation for the CWA §404 permit program but one could be considered for inclusion in ADEQ rules for the program.
- Pursue the use of CWA §106 Water Funds which are currently sent by EPA to ADEQ to initially set up the CWA §404 Permit Program. ADEQ has suggested that CWA §106 Water Funds can be used for this purpose.
- Pursue the option of both ADOT and Pima County to separately fund an ADEQ staff person to prioritize the review of ADOT and Pima County CWA §404 permit applications as needed. This would reduce the ADEQ's projected annual costs.
- Pursue federal funds to review and issue CWA §404 permits in Arizona to ADEQ to recognize the reduced needs for Corps CWA §404 Permit Program staff and increased needs for ADEQ CWA §404 Permit Program staff.
- Based on the success of a similar strategy in Michigan, pursue the allocation, for one year, of additional General Funds in the annual budget to ADEQ from the Arizona Legislature with support from the Arizona Governor's Office and the interested regulated community to start the program and then be able to accurately evaluate the ongoing costs based on real data.
- Perform an economic feasibility study to ensure the best and most efficient decision is made regarding CWA §404 fees and funding.

It should be noted that ADEQ may need to consider a combination of funding methods in order to fully fund the CWA §404 Permit Program and to adjust for outlier applications that are difficult to include in the permit program analysis or projections.

All of the Fees-TWG's data will be made available to ADEQ, including the raw permit data from the Corps for their own analysis.

VIII. Dissent Opinions

Sierra Club – Grand Canyon Chapter

A primary concern that has been voiced by a diversity of stakeholders across the board at the Arizona Legislature, at the Arizona Department of Environmental Quality (ADEQ) meetings, and in the 404 working groups, is that state primacy of Section 404 of the Clean Water Act dredge and fill permits will come at a high price. Virginia's Department of Environmental Quality, weighing whether to pursue primacy, found that assumption would cost the state \$18 million over the first five years, and \$3.4 million annually thereafter. According to information provided to the Fees Technical Working Group by ADEQ in a preliminary estimate, it would cost "\$2.1 million on an annual basis to run the CWA §404 Permit Program with ten (10) full-time employees, including \$220,000 projected for legal support services by the Arizona Attorney General." Key issues include the immediate costs of program development and implementation as well as the perpetual costs of overseeing the program, liabilities associated with this authority, investigation costs for reports of unauthorized activity, enforcement actions, and maintenance of mitigation projects and properties.

These concerns are compounded by the fact that there is little funding available specifically for Section 404 program administration. A publication by the Association of State Wetland Managers states that "states administering the Section 404 permit program receive no federal funds specifically dedicated to support operation of the permit program." While states can get Environmental Protection Agency (EPA) funds to support the "development of state wetland regulatory programs," the primary costs are in the program's administration. Michigan's 404 program, though "broadly supported," faced opposition due to its cost during "challenging economic conditions." In 2009, the program was nearly handed back to the federal government due to cost concerns.

Of grave concern is the possible outcome that because ADEQ intends to fund the program through permitting fees, the agency will become motivated to quickly issue permits that would otherwise require careful consideration. If the state elects to assume primacy and the costs that come with it, a dedicated funding source must be developed so that the state is not incentivized to issue permits for the wrong reasons and so there is funding for program staff during times when fewer permits are requested, such as economic downturns.

Establishing a program that is based on permit fees also can unfairly advantage those with the deepest pockets and result in weak permits being moved along more quickly than those that are more protective.

Finally, inadequate and/or uneven funding will make the ADEQ less likely to achieve the (required) same level of enforcement rigor as the Corps' program achieves and more likely to subject the state taxpayers to lawsuits.

That is why the ADEQ should seek a general fund appropriation to help fund this program, if it is to proceed at all.

Sandy Bahr
Chapter Director,
Sierra Club – Grand Canyon Chapter

City of Phoenix

The City of Phoenix (Phoenix) has appreciated the opportunity to participate in the Fees TWG. Although the TWGs were formed as consensus-driven groups, the Fees TWG was unable to reach consensus on the recommendations contained in this paper. The funding option supported by Phoenix was removed from this white paper but we believe it is critical that this option be included as part of ADEQ's Section 404 program formulation discussions and, to that purpose, we have written this opinion for inclusion in the white paper.

Phoenix Recommendation 1: Complete a Section 404 Assumption Feasibility Study prior to finalizing a decision on an ADEQ Section 404 program, including funding options

Phoenix recommends ADEQ undertake an adequate, appropriate, and thorough feasibility study to fully investigate the viability of the proposed assumption and to investigate economic impacts and funding considerations. ADEQ should hire outside experts to complete a written report supported by appropriate and relevant data. Study experts should include but not be limited to: economists, sociologists, other scientists (including biologists, riparian ecologists, and water resources/ecosystem engineers), and Section 404 experts. The Fees TWG white paper (alone or in concert with the other TWG white papers) should not be considered a substitute for this feasibility study. These white papers and the recommendations therein are not a referendum on the viability or economic impacts of an ADEQ assumption decision and should not be interpreted in that manner. The feasibility study is an important and necessary decision-making tool as ADEQ moves on decisions relating to a proposed assumption, particularly considering the experiences of other states who have considered assuming the program. Phoenix recommends ADEQ act on a feasibility study as the next step in their process.

Phoenix Recommendation 2: Fund the program with a base of general funds

Phoenix would support ADEQ's request to the Arizona Legislature and Governor's Office for a base of general funds to support an ADEQ-assumed Section 404 program. If necessary, minimal supplemental applicant fees would be acceptable, but the amount should be carefully considered and kept low so it doesn't result in unintended impacts that would work in opposition to Clean Water Act Section 404 program goals.

- A. The Section 404 permit program regulates parties covering a wide range of circumstances, from large industry and commercial enterprises, to municipalities of all sizes and other government agencies, to small business owners and individual landowners.
 - a. The potential fees for individual and general permits identified by the Fees TWG as necessary to support a fully fee-funded ADEQ Section 404 permitting program would be highly burdensome to many applicants. Individual permits would be the most expensive and it's important to recognize that an entity of any size (even down to an individual landowner) may need an individual permit based on the resources to be impacted, the type of activity proposed, or the level of controversy expected for the activity. Even the lower proposed fee for a general permit would be burdensome to individuals with smaller operations.
 - i. Burdensome fees could result in either an increase in non-compliance (i.e., unpermitted dredge and fill activities) or result in an economic opportunity cost unequally impacting applicants with smaller operations, who would not be able to undertake activities to improve their land or operations because of the excessive cost of obtaining a Section 404 permit.
 - b. Supporting the ADEQ Section 404 program with a substantial base of general funds would keep fees minimal, reducing the burden on applicants, encouraging higher compliance rates, and

resulting in greater protections to the physical, chemical, and biological integrity of Waters of the U.S.

- B. Section 404 permitting load can vary widely year to year based on economic conditions. In 10 years of data on Section 404 permitting ADEQ obtained from the USACE, the number of individual permits provided in one year varied from as low as 5 permits up to 10 permits (a 100% difference). The number of general permits (both nationwide permits and regional general permits) provided in one year varied from as low as 89 permits up to 510 permits (a 473% difference).
 - a. With such a widely varying workload, it will be important that ADEQ maintain a consistent staffing level to ensure that permits can be reviewed with consistent levels of service (i.e., without undue delays because of understaffing). This means that, even in a year with fewer permits requested, ADEQ should maintain Section 404 permit staffing levels. With so few permits issued in ADEQ-assumable Waters of the U.S. to begin with (an average of 227 general permits and 8 individual permits in one year), a reduction in fee income from decreased permit requests one year would have a massive impact on the ability of ADEQ to maintain staffing.
 - b. Supporting the ADEQ Section 404 program with a base of general funds would assist ADEQ in providing a consistent level of service, maintaining appropriate levels of review, coordination, and analysis, while still retaining reasonable timeframes for providing a permit despite the fluctuation in year-by-year permit requests.

Phoenix Recommendation 3: Avoid creating an unequal system and incentivizing inadequate review through a fee-based expedited permit program

Phoenix recommends care in developing the permit program so that permit decisions are always made with respect to the physical, chemical, and biological impacts of an activity in Waters of the U.S. (including wetlands), avoiding the risk of being motivated by the need to capture more fees.

- A. The nature of a permit system that includes general and individual permits (and particularly one like Section 404 that also has tiers within general permits) incorporates the idea of expedited permits in its framework. General permits *are* a type of expedited permit, with a generally much faster permitting timeframe than individual permits. This type of tiered permit system incentivizes the applicant to avoid and minimize impacts in Waters of the U.S. to be covered by a general permit, which inherently encourages applicants to meet the intent and goals of the Section 404 permit program.
- B. Creating an additional fee-based expedited permit program for activities that would require an individual permit would:
 - a. remove the avoidance and minimization incentive from a permit timeframe perspective;
 - b. provide benefits to larger or wealthier applicants that are inaccessible to smaller or less wealthy applicants who can't afford the additional fee;
 - c. create a serious risk within ADEQ of inadequate review, analysis, and outside agency coordination to meet an expedited timeframe; and
 - d. create applicant expectations that may be impossible to meet in many circumstances (e.g., some individual permits will need to have EPA review or the resources impacted require certain consultations and negotiations that will take time to accomplish).

Phoenix Recommendation 4: Applicant fees should not pay ADEQ's attorney costs

The budget which the Fees TWG worked with included \$220,000 of ADEQ attorney costs. Phoenix recommends that any fees paid by the applicant should not be applied toward ADEQ attorney costs, as that may create a bias when performing enforcement on cases related to Section 404.

IX. Exhibits

Exhibit 1: Defined CWA §404 Permit Corps Jurisdictions



ARIZONA SOVEREIGN NATIONS

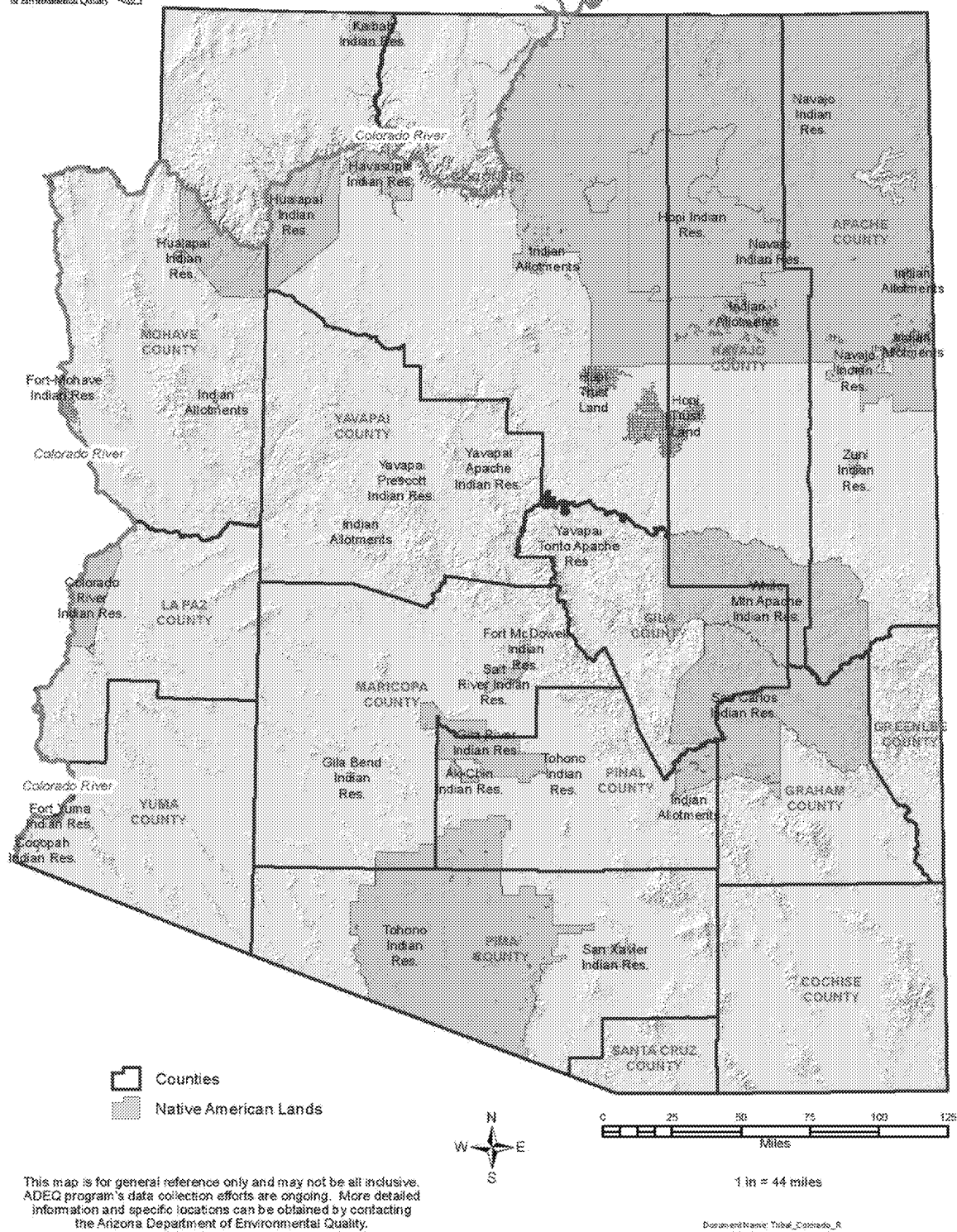


Exhibit 2: Proposed FTE Breakdown

10 FTE	Estimated Yearly Costs
Engineer 3	\$ 73,500.00
Senior Scientist	\$ 80,000.00
Senior Scientist	\$ 80,000.00
ESS 3	\$ 59,850.00
ESS 3	\$ 59,850.00
Hydro 3	\$ 67,200.00
Hydro 2	\$ 59,850.00
ESS 2	\$ 50,400.00
Tech 2	\$ 47,250.00
Tech 2	\$ 47,250.00
Manager	\$ 78,750.00
Salary Costs	\$ 703,900.00
plus Indirect Costs (84% of salary)	\$ 1,295,176.00
plus Potential Raises and Spotlight Awards (20%)	\$ 1,554,211.20
plus Other Costs (23%)	\$ 1,911,679.78
plus Litigation Costs	\$ 2,131,679.78

Exhibit 3: New Jersey's CWA §404 Permit Fees

From N.J.A.C. 7:7A - FRESHWATER WETLANDS PROTECTION ACT RULES

Table 18.1
APPLICATION FEES

Exemption letter	
	Fee
Exemption letter pursuant to N.J.A.C. 7:7A-2.6	\$500.00
Letter of Interpretation (LOI)	
	Fee
Presence/absence LOI pursuant to N.J.A.C. 7:7A-4.3	\$1,000
Footprint of disturbance LOI pursuant to N.J.A.C. 7:7A-4.3	\$1,000
Delineation LOI pursuant to N.J.A.C. 7:7A-4.4	\$1,000
Line verification LOI pursuant to N.J.A.C. 7:7A-4.5	\$1,000 plus \$100.00 per acre of the site (or fraction thereof)
Authorization under a general permit-by-certification pursuant to N.J.A.C. 7:7A-6	
	Fee
General permit-by-certification 24—Repair or modification of a malfunctioning individual subsurface sewage disposal (septic) system, N.J.A.C. 7:7A-6.2	No fee
Any other general permit-by-certification	\$1,000
Authorization under a general permit pursuant to N.J.A.C. 7:7A-7	
	Fee
General permit 16—Habitat creation and enhancement activities, N.J.A.C. 7:7A-7.16	No fee
General permit 17—Trails and boardwalks, N.J.A.C. 7:7A-7.17, for a project located on publicly-owned land	No fee
General permit 24—Malfunctioning individual subsurface sewage disposal (septic) systems, N.J.A.C. 7:7A-7.24	No fee
Any other general permit	\$1,000
Transition area waiver pursuant to N.J.A.C. 7:7A-8	
	Fee
Transition area waiver with a valid letter of interpretation	\$1,000 plus \$100.00 per acres of disturbed regulated area (or fraction thereof)
Transition area waiver without a valid letter of interpretation	\$1,000 plus \$100.00 per acre of disturbed regulated area (or fraction thereof) and the application fee for the appropriate LOI

Freshwater wetlands or open water fill individual permit pursuant to N.J.A.C. 7:7A-10

	Fee
Freshwater wetlands or open water fill individual permit for the construction of one single-family home or duplex and/or appurtenant improvements, which is not being constructed as part of a residential subdivision or multi-unit development	\$2,000
Freshwater wetlands or open water fill individual permit for any other activity	\$5,000 plus \$2,500 per acre of disturbed regulated area (or fraction thereof)

Water quality certificate pursuant to N.J.A.C. 7:7A-2.1(d)

	Fee
Water quality certificate where a permit is not also issued	\$5,000 plus \$2,500 per acre of disturbed regulated area (or fraction thereof)

Modification of an authorization under a general permit, a transition area waiver or a freshwater wetlands or open water fill individual permit pursuant to N.J.A.C. 7:7A-20.6

	Fee
Administrative modification	No fee
Minor technical modification	\$500.00
Major technical modification of a transition area waiver, general permit authorization, freshwater wetlands or open water fill individual permit	30 percent of the original application fee or \$500.00, whichever is greater

Extension of a letter of interpretation (LOI) pursuant to N.J.A.C. 7:7A-4.6 or of an authorization under a general permit, a transition area waiver, or an individual permit pursuant to N.J.A.C. 7:7A-20.4

	Fee
Extension of a presence/absence LOI	\$500.00
Extension of a footprint of disturbance LOI	\$500.00
Extension of a delineation LOI	\$500.00
Extension of a verification LOI	50 percent of the original application fee or \$500.00, whichever is greater
Extension of an authorization under a general permit	\$500.00
Extension of a transition area waiver	\$500.00
Extension of a freshwater wetlands or open water fill individual permit	50 percent of original application fee or \$500.00, whichever is greater

Additional application fee for stormwater review if a project is a "major development" pursuant to the Stormwater Management Rules (see N.J.A.C. 7:8-1.2)

	Fee ¹
Base fee for any major development	\$3,000
Additional fee for review of groundwater recharge calculations (see N.J.A.C. 7:8-5.4)	\$250.00 per acre of land disturbed by the project (or fraction thereof)
Additional fee for review of runoff quantity calculations (see N.J.A.C. 7:8-5.4)	\$250.00 per acre of land disturbed by the project (or fraction thereof)

Additional fee for review of water quality calculations (see N.J.A.C. 7:8-5.5)	\$250.00 per acre of impervious surface subject to water quality review (or fraction thereof)
Modification of previously reviewed stormwater calculation	Thirty percent of the original stormwater fee

¹The additional application fee for stormwater review set forth in this table shall not exceed \$20,000